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IN THE

Supreme Court of the United States

October Term, 1963.

No. 478

BESS KAYE,

Appellant,

v.

SPENCE CHAPIN ADOPTION HOME,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

JURISDICTIONAL STATEMENT.

BESS KAYE,
Appellant Pro Se,
160 Weyman Ave.,
New Rochelle, N. Y.

THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

BESS KAYE,

Appellant,

v.

SPENCE CHAPIN ADOPTION SERVICE,

Appellee.

On Appeal From The Court of Appeals of New York.

JURISDICTIONAL STATEMENT.

Appellant, Bess Kaye, appeals from the judgment of the Court of Appeals of New York entered on February 21, 1963, which sustained the Supreme Court judgment of dismissal of the writ of the appellant, the grandmother, seeking to regain custody of her grandchild.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinions Below.

There was no opinion in the New York Supreme Court, the Appellate Division and the Court of Appeals.

Jurisdiction.

The writ of habeas corpus was dismissed by the New York Supreme Court on February 2, 1961. Appellant excepted to this ruling and filed notice of appeal to the New York Appellate Division on March 1, 1961. The Appellate Division affirmed. Appellant made motion for re-argument and leave to appeal to New York Court of Appeals which was denied. Leave for appeal was granted by Court of Appeals of New York. Judgment was affirmed by Court of Appeals of New York on February 21, 1963. The constitutional question could not be raised in Trial Court as appellant didn't know before hearing that due process would be denied her and child. It wasn't until hearing in Appellate Division that she had any solid basis to believe that child was put in wrong religion when appellee argued natural mother is a Protestant.

The constitutional question was first raised in the motion for re-hearing to the Appellate Division (page 3, points 8 and 9 typewritten record). It was subsequently raised again in motion duly made for leave to appeal to the Court of Appeals. The constitutional question was again raised as certified questions in notice of appeal to New York Court of Appeals 306, 310R. The constitutional questions were again raised in certified questions in brief to Court of Appeals and the First, Fifth and Fourteenth Amendments argued in brief and quoted.

Jurisdiction of the appeal is conferred on this Court by 28 U. S. C. 1257 (2) and 28 U. S. C. 1257 (3). The following cases sustain the jurisdiction of this Court. *Hamilton v. Regents of the University of California,* 293 U. S. 245 (1934); *McCollum v. Board of Education,* 333 U. S. 203 (1948); *Wieman v. Updegraff,* 344 U. S. 183 (1952); *Garner v. Los Angeles Board,* 341 U. S. 716 (1951); *Slochower v. Board of Higher Education,* 350 U. S. 551 (1956); *Uphaus v. Wyman,* 360 U. S. 72 (1959).

Statutes Involved.

The validity of New York statute Section 114 of the Domestic Relations Law is involved which provides in pertinent part:

> "If satisfied that the moral and temporal interests of the foster child will be promoted thereby, the judge or surrogate shall make an order approving the adoption and directing that the foster child shall thenceforth be regarded and treated in all respects as the child of the foster parents or parent."

Questions Presented.

(1) Whether the New York Constitution, Section 18, Article 6; Section 3, Article 1; Section 32, Article 6; Section 6, Article 1, and the following New York State statutes: Domestic Relations Law, Sections 113, 117; Penal Law, Sections 486, 2076; Public Welfare Law, Section 111; Social Welfare Law, Sections 372 (subdiv. f), 373 (subdiv. 2), 383 (subdiv. 1), 385, 389; Family Court Act, Section 116, subdivision A, Section 241; State Charities Law, Section 302, as applied to the facts in this case violates the due process clause of the Fourteenth Amendment of the United States Constitution.

(2) Whether the forcible and violent snatching of a child from the custody of a maternal grandmother by an emotionally disturbed mother and a father who had abandoned the child to be turned over to an adoption agency is in violation of the child's constitutional rights under the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution.

(3) Whether the forcible seizure of a child from a grandmother, who was ready, able and willing to continue raising child in the child's religion, and adoption of child

by persons of a different religion is in violation of the child's rights under the religious clause of the First Amendment and due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and invalid.

(4) Whether the appellant and child was given an unfair trial and denied due process guaranteed to them by the due process clause of the Fourteenth Amendment of the United States Constitution by

(a) The Trial Judge refusing to grant appellant's request for a 10-day adjournment to allow counsel she had retained to return from Florida.

(b) The Trial Judge forcing appellant to trial without counsel on repeated threats to dismiss her petition.

(c) The Trial Judge repeatedly refusing appellant's requests to see the eight documents in court which she subpoenaed, although she claimed she could not proceed without them and needed them to prove her claims.

(d) The Trial Judge examining "all the papers in this case" without placing them in the record despite its assurance that "They will be offered in the record in support of your petition."

(e) The Trial Judge dismissing appellant's petition without having given appellant the opportunity to see her subpoenaed documents she needed to prove her claims.

(f) The Trial Judge cutting the hearing short by dismissing the petition in order to proceed with another case.

(5) Whether a child, by the failure of the Court to appoint a guardian ad litem to protect her interest as required by Civil Practice Act, Article 12, Section 1201, formerly Section 202 of the Civil Practice Act of New York State, failure of Court to require respondent to disclose the facts about foster parents, by being denied due

process and by not being given a full and fair hearing to develop all the basic facts in litigation concerning her life and welfare, has been deprived of her constitutional rights under the due process clause of the Fourteenth Amendment of the United States Constitution.

Statement of the Case.

Appellant's grandchild, whose custody she is seeking was born of a Jewish mother, who was born of Jewish parents. The child's mother was raised in appellant's home that practiced the tenets and rituals of the Jewish faith. The mother was confirmed from a Jewish synagogue after attending Sunday School many years. The father is a non-believer. He left home at an early age and at no time believed in or embraced any religion or attended any house of worship. The mother, a gifted and sensitive girl, was deeply affected over losing a father she was deeply attached to, at a time when the family was uprooted during the war. The child's father is an irresponsible and alcoholic man who allowed his pregnant wife to sleep on the floor, etc. A daughter, Heather, was born, but the father failed to support the family. After the parents separated, the child was buffetted around and on occasion left with her grandmother. Therefore, mutual love and devotion had already developed between the child and her grandmother by the time the mother placed the child in her custody. At first, the child was very insecure, but by giving her all her love and devotion, the grandmother was able to overcome the child's insecurity. After the child was living happily and securely with her grandmother, the child's mother, obviously distraught, came with the father (who she was still separated from and who had completely abandoned the child) and aided and abetted by the adoption agency snatched the child and ran away with her. The next day the parents signed the child away to the Spence Chapin

Adoption Agency. While the child was still in the foster home and before she had been placed with adoptive parents, the grandmother and two Rabbis contacted the adoption agency, but the agency made no move to look into the matter. Appellant could not apply to the judge or surrogate of the court in which the adoption took place because the adoption agency refused to divulge the name or identity of such court, judge or surrogate and refused to divulge the names, identity or addresses of the foster parents. Her only remedy was to invoke the power of the Supreme Court which she did in this case.

The habeas corpus writ was returnable December 7, 1960, at which time Mr. Justice Capozzoli, as *parens patriae*, expressed concern for the need to secure the facts surrounding the actions of the mother and father and ordered and investigation.

> "It strikes the Court as peculiar that the mother of a child as beautiful as this one 3 years of age, as that picture shows—that the mother, who I understand, is about 24 years of age—would, for reasons best known to herself with her husband deliver this child to the adoption service, give up her rights to the child, when she has her own mother with whom that child was staying, who goes so far as get a habeas corpus and come into this court to stop this thing." That factual situation to me raises doubts in my mind. I feel as a Justice of the Supreme Court of this state that I have been sufficiently alerted to the fact that I want an investigation. "It gives me reason to pause in my work here when I see a situation such as this. How come? Why?"

Respondent's counsel said: "We have nothing to fear as far as exposing the facts to the light of day is concerned" (80R). Yet, neither at the "hearing," nor since, has respondent seen fit to expose the facts. Mr. Justice Capozzoli marked the case off the calendar to be restored after the filing of a report by

the Court's social agency (80R). On January 18, 1960, the case was adjourned to the 24th to permit the service of subpoenaes. Appellant became ill and fearing the writ would be dismissed, asked Mr. Joseph Glass, an attorney she knew, to make (not file) an appearance and ask for a 10-day adjournment. On February 2nd, Mr. William Glass, the son of Joseph Glass, who the appellant had never seen before and only spoke to briefly, bewildered the appellant by appearing at the hearing. He admitted that he had not been retained and did not know the facts of the case and was not prepared to represent appellant (94R, 96R). Appellant was without counsel. Having the right to counsel and desiring to retain Mrs. Shientag, then in Florida and scheduled to return to New York in 10 days, appellant's request for a 10-day adjournment to enable Mrs. Shientag to come in to represent her should have been granted. The record shows:

> "The Court: What is the application?
> "A Voice: My name is Reich. I share space with Mrs. Shientag, and Mrs. Shientag is presently in Florida. I spoke to her last night. Mrs. Kaye called Miami to retain her in this proceeding. Mrs. Shientag asked me to come down to make an application to see if she could have an adjournment for ten days * * *" (84, 85R).
> "The Court: The case is going to proceed. The application for an adjournment is denied" (86).
>
> . . . . . .
>
> "The Court: Your application for a further continuance is overruled and the hearing on your writ must proceed at once. Are you ready?
> "Mrs. Kaye: I am not ready.
> "The Court: All right, the petition is dismissed" (97).
> "The Court: All right, you may step down.
> "The Witness: Your Honor, I have a right to see the records I have subpoenaed.

"The Court: Will you please step down now. The petition is dismissed. The Court concludes after—

"The Witness: I have a right to see what religion my granddaughter was put in.

"The Court: The Court concludes after hearing and seeing the petitioner and examining all the papers in this case that there is no basis for this petition and it is accordingly dismissed" (142, 143).

* * * * * *

"I have received a lot of papers in response to those subpoenas. They will be offered in evidence in support of your petition" (99).

* * * * * *

"The Court: What you do, if you are dissatisfied with this decision, you can hire a lawyer and take any steps you deem appropriate with reference to it. All right, we will continue with the Talcott case" (146).

The Trial Judge forced the appellant on to trial repeatedly threatening to dismiss her petition. As is indicated above from the record the Trial Judge refused to grant the 10-day adjournment and refused to let appellant see the records she had subpoenaed to prove her claims. Although appellant referred to her records seven times (99, 100, 101, 116, 142, 144, 146R), the Trial Court dismissed the petition without letting appellant see the records. And although the Trial Judge promised Court and appellant that he would offer the records in evidence in support of her petition, he failed to do so. Nobody but the Trial Judge knows why he failed to keep his promise. The Trial Judge also had the report made by the Court's social investigator. Six days after the dismissal of the writ, the Spence Chapin Adoption Service legalized the adoption. Appellee has not declared the exact date in writing or orally, but appellant saw the date on appellee's printer's proof which was eliminated from the finished proof, presumably because Spence Chapin

did not want the Court to know that they had rushed into legalizing the adoption immediately after dismissal of the writ while case was still in litigation. Appellant filed notice of appeal to Appellate Division and retained Mr. George Paston to represent her. Appellant's counsel submitted on the appeal, feeling secure that, on the papers below, a reversal should ensue. Appellee's counsel alone argued the appeal and, when he misled the Court with the erroneous information that the natural mother is a Protestant, appellant's counsel was not in a position to correct it. Appellant's counsel made a motion for re-argument based on the erroneous information that the appellee had given Court, but it was denied. Determination was made by Appellate Division without knowing the religion of the adoptive parents as appellee failed to put in writing or to inform Court of the adoptive parents' religion. Appellate Division affirmed without opinion. Appellant filed leave for appeal to Appellate Division to go to Court of Appeals, but it was denied. Leave to appeal to Court of Appeals was granted. Although appellee had argued in the Appellate Division that natural mother is a Protestant, in the Court of Appeals he argued that natural mother is a non-practicing Jew. This indicates that the Spence Chapin Adoption Service did not know the religion of the mother and, therefore, could not have put the child in the right religion. In the Court of Appeals the Spence Chapin Adoption Service was not censored for legalizing adoption while in litigation but instead the Spencer Chapin Adoption Service, through their attorney was given the nod of approval for this unethical behavior by one of the Court of Appeal judges. Appellee is his argument not only relied on matters completely outside the record but which were nowhere in writing and on events which allegedly transpired after the rendition of the judgment of dismissal appealed from, to wit, the subsequent alleged adoption and its statement

to the Court of Appeals of the alleged religion of the foster parents. To date the appellee has failed to put in writing the religion of natural mother and adoptive parents. Court of Appeals affirmed without opinion.

Appellant's motion to Court of Appeals to have the remittitur amended to show that a constitutional question was presented and necessarily passed on was denied.

The facts of this case and the proceedings in the New York courts on this appeal have been described above. Since there has been a gross miscarriage of justice in the state courts, appellant can only hope and pray that in the honorable court of the United States Supreme Court justice will prevail.

SUBSTANTIALITY OF THE QUESTIONS.

I. The procedure in the State Courts in the present case was so unfair as to violate the due process clause of the 14th Amendment.

The Trial Court's (a) refusal to grant an adjournment to enable Mrs. Florence Shientag to return from Florida to act as counsel for appellant, (b) forcing appellant to proceed without counsel, (c) refusal to allow appellant to see the documents in court which she had subpoenaed and the report of the Court's social investigator and which were admitted into evidence, (d) failure of Trial Judge to keep promise to Court and appellant to have her documents marked in evidence in support of her petition violated her constitutional rights to a fair trial and due process and constitutes a sufficient basis for a reversal of the dismissal and the ordering of a new hearing.

> "In the 14th Amendment the words 'due process of law' refer to that law of the land in each state

> which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Re Kemmler*, 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 519.

The appellant in the case at bar, a layman who was no match for the skilled respondent's counsel (two lawyers), could not cope with the law's procedural complexity. She told the Court, "I am not qualified to do this without a lawyer" (141).

> "Yet we may not overlook the fact that the statute and rights of the child as well as rights of the parents are involved. That fact inheres in the court's power to deprive the child of liberty and the parents of custody • • •. The serious nature and effect of this adjudication suggests that Congress could not have been unaware of the need for effective assistance of counsel.
>
> "Our concern for the fair administration of justice impels us to hold that, in this and in similar cases in the future, the juvenile *must* be advised that he has a right to engage counsel or to have counsel named on his behalf." *Shioutakon v. District of Columbia*, 236 F. 2d 666, 98 App. D. C. 371 (1956).

The violation of due process by not allowing a party to be represented by counsel is not cured by the Trial Court's suggestion that she may hire a lawyer after the hearing is concluded.

> "A layman is no match for the skilled prosecutor whom he confronts in the courtroom. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." *Williams vs. Kaiser*, 323 U. S. 471, 476.

Forcing appellant to act as her own counsel, the Court should have granted her requests to see the papers in

court which she had subpoenaed, and which were admitted into evidence (99R). If she were represented by counsel, he would have been able to see those documents supporting her petition. Forcing her to act as her own counsel, it was reversible error to refuse to permit her to see them. A party may examine even a confidential record in a proceeding.

To the appellant's repeated requests to see the documents she had subpoenaed to prove her claim the Trial Judge said:

> "I have received a lot of papers in response to those subpoenas. They will be offered in evidence in support of your petition" (99).

Appellant knew nothing of trial mechanics whereby the court reporter marks the exhibit numbers, and she is not to be penalized for the Court's failure to direct such marking especially in the face of the Trial Judge's promise to appellant and court. A layman is entitled to believe and must rely upon the Trial Court's ruling admitting papers into evidence in support of her petition. Papers received in evidence but, by inadvertence, not marked as exhibits, may be considered by the Appellate Court. The report of the Court's social investigator was included among the records admitted into evidence, but, by inadvertence, not marked as an exhibit. Confrontation and cross examination are basic ingredients in a fair trial. It is a fundamental concept of our judicial process that decisions should not be made upon secret evidence available only to the eyes of the Trial Judge.

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross examination and the conviction that no statement (unless by special exception) should be used as testimony

> until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." Chief Justice Warren's opinion in *Greene v. McElroy*, 360 U. S. 474.

The hearing was held in a closed hearing not in accordance with due process.

> "The order or decree awarding the custody of a minor child to one of the parents must be based on evidence heard in open court in observance of the requirements of due process, rather than on information obtained by private investigation." American Law Reports Annotated, 2d Series, 35 A.L.R. 2d.

Repeatedly stating, "The petition is dismissed" (88, 98, 142, 143R), in order to continue with another case, the Talcott case (146R) was "expedition." Expedition in the trial of a case is to be encouraged but justice should not be sacrificed in the interest of speed, particularly where the life and welfare of a helpless child is involved.

On the hearing below, the infant was not represented by counsel or by a guardian ad litem. The parents were not present, nor were they represented by counsel despite respondent's promise to produce them in court (17, 27, 60R), and neither were the adoptive parents present. Appellant was not represented by counsel. Respondent could have brought the mother voluntarily into court (60R) or by means of a subpoena, to prove whether she knew what she was doing when she signed the surrender papers. Respondent, alone, knows her whereabouts and refuses to divulge them to the Court or to appellant. Respondent admitted its ability and professed its willingness to bring in the parents (60R) but failed to do so. The important questions as to whether the mother knew what she was doing; the extent of respondent's knowledgeable complicity in the mother's drastic, voidable and illegal actions, the religion of the adoptive parents, and respondent's illegal acts of receiving the child and delivering her

to persons of a different religious faith than that of the child, should be developed at a full and complete hearing. In view of the tender age of the infant, a more complete record should be developed and attention given to the matters raised on this appeal.

On an application for an adjournment a Trial Court has a wide discretion, but that discretion is not absolute. Forcing appellant on for trial, without counsel, she begged leave to see and to use the documents in court to prove her claims. The Trial Court said that he would place the documents in the record. Failing to have them marked as exhibits and dismissing the proceeding, constituted reversible error and an unfair trial and a deprivation of the right to due process. The Trial Court failed to cause any exploration of the vital objective factors to be made, particularly concerning the child's present whereabouts and surroundings.

Petitioner's request to see the documents and the other papers in this case was denied. Yet, the evidence upon which the Court acted was "all the papers in this case (142, 143). The evidence upon which the Court acts should be known by all the parties in the proceeding. In the interests of substantial justice, the orders appealed from should be reversed.

In *Morgan v. U. S.*, the Court held:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and meet them."
>
> *Morgan v. U. S.*, 304 U. S. 1, 18, 58 S. Ct. 773, 776, 999, 82 L. Ed. 1129.

In *Parker v. Lester*, the Court held:

> "The decrees below should be reversed because the use of the trial court of the secret psychiatric and psychological reports, never disclosed to the

parties, was fundamental error and deprived appellant of due process of law."

227 F. 2d 708.

The order of affirmance in the case at bar is in irreconcilable conflict with the law laid down by the same Courts. In *Herb v. Herb*, the majority held:

> "The evidence upon which the Court acts should be known by the parties to the proceeding. It is a fundamental concept of our judicial process that decisions in civil actions and proceedings should not be made upon secret evidence available only to the eyes of the Trial Judge and members of an appellate tribunal." *Herb v. Herb*, 8 App. Div. at 422 or 419,

In 1962 in the case of *Kessler v. Kessler*, Justice Van Voorhis, speaking for the majority, said:

> "Special Term erred as a matter of law in considering the reports of a psychiatrist and of a psychologist concerning their examination of the parties and their child and in the refusal of Special Term to allow the parties or their counsel to see these reports or the report of the investigation made by the family counsellor of the Court." *Kessler v. Kessler*, 10 A. D. 2d 935.

In *Kessler v. Kessler*, the Court also held:

> "If stipulation was not entered into, it could not be admitted into evidence nor examined by the Court without consent of the parties." (See 99, 131, 141, 142, 143, 147R).

In *Municipal Service RE Co. v. DB & MH Corp.*, the majority ruled as follows:

> "A 'proper judgment' is, of course, a judgment rendered in accordance with due process of law after a trial in which a party against whom the judgment is rendered has had fair opportunity to present his evidence or defense in answer to the claim which is adjudicated against him." *Municipal Serv. RE Co. v. DB & MH Corp.*, 257 N. Y. 423, 429, 178 N. E. 745.

In the Trial Court, the appellant suffered loss of dignity due to the rude and belittling manner in which the Trial Judge addressed and treated her. It is in the American tradition that even in criminal trials the accused is treated civilly. The one place a man ought to get justice and where all men should be equal is in a courtroom. Our Courts are supposedly the great levellers, but the Spence Chapin Authorized Agency represented by an attorney associated with one of New York's largest and most prestigious firms was treated in a deferential and preferential manner. The core of democracy is "Equal rights for all, special privileges for none."

The late beloved Pope John in his great encyclical said:

> "Every human being has the right to respect for his person."

In the case at bar not only was the decision made by the Trial Judge on secret evidence available only to his eyes, but said evidence was not made part of the record as the Trial Judge promised appellant and Court. Determination was made by Appellate Division without seeing the evidence and documentary proof. Decrees below should be reversed because the use of reports, never disclosed to the parties, was fundamental error and deprived appellant of due process of law at the custody hearing. The only way due process of law can be reestablished is for this Court to vacate the decrees below and direct a complete hearing *de novo*.

> "Unless a person involved in administrative as well as judicial proceedings has received a hearing that is both sufficient and fair and has been subjected to rulings amply supported by the evidence introduced thereat, he will not be considered to have been accorded due process." Constitution of

the United States of America, 1952, prepared by the Legislative Reference Service, Library of Congress, Edward S. Corwin, Editor. United States Government Printing Office, 1953.

II. The New York Statutes and Constitutional Provisions relating to child adoptions as applied in this case, violates the due process clause of the Fourteenth Amendment.

The religious liberty, not only of this child, but of all Americans, lies in the principle of law set forth in the First Amendment to the Constitution, which says that Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof, and is made applicable to the states by the Fourteenth Amendment to the United States Constitution which still guarantees that no state shall deprive any person of life, liberty or property without due process of law.

> "The Free Exercise clause of the First Amendment is operative against the states by virtue of the Fourteenth Amendment." *Engel v. Vitale*, 370 U. S. 421 at 434.

In this unprecedented adoption, this child has been deprived of her most valuable rights—her liberty and welfare, by taking her from the home of her grandmother where she is living happily and securely and placing her with utter strangers of a different religion for adoption and barring her forever from the sight of, association or communication with, or any knowledge of any of her blood relatives.

It was done without due process of law and it was done without the appointment of a guardian ad litem to protect her interests. It cannot be successfully denied that an infant is entitled to the equal protection of the laws which

accord protection to adults; otherwise, there would be a violation of said constitutional guarantees. A child is entitled to no less protection than an adult. If anything, if a helpless child is a party to an action, he *must* appear by a guardian ad litem appointed by the Court (Civil Practice Act, Article 12, Section 1201 [formerly Section 202]).

The government and the appellee, separately or collectively, have no legal power and are forbidden by the Constitution and statutes to compel a Jewish person, adult or child, to conform in his or her religious belief and mode of worship, to the view of a different religious sect. By violently seizing this helpless Jewish child and placing her with, and to be reared by, non-Jews, appellee, thus far, has accomplished an illegal and immoral act, in defiance of the Constitutions of the United States and of the State of New York and the New York statutes which require that the child's "religious faith shall be preserved and protected by the Court," to which "all children have a natural and legal right of which they cannot be deprived by their temporary exposure to the culture of another religion prior to the age of reason" (*Re Santos*, 278 App. Div. 373, 304 N. Y. 483). Since the law forbids even their *temporary* exposure to the culture of another religion, it is illegal, unconstitutional and more obnoxious to expose them *permanently* to the culture of another religion. Traditionally, legally and morally a child's religion is of its parents. Surely it cannot be argued that the Protestant religion is the proper religion for a child born of a Jewish mother and a non-believing father, who although born a Roman Catholic did not ever and has not to date ever believed in or practiced the Catholic faith. And, furthermore, has not at any time attended a Catholic church. According to Jewish religious law a child takes the faith of its mother. The basis of such law is the certainty of the maternal parentage of every child. So, too, New York

law Section 83, Decedent Estate Law, governing descent and distribution of an intestate's property, recognizes the certainty of maternal parentage, but not paternal parentage, and, therefore, permits a child born out of wedlock to inherit from its mother (sub. 13) but not from the father, even where the paternal parentage of such child is acknowledged.

> "The First Amendment was intended to allow to everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. Oppressive measures were adopted and cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to confirm, in their religious beliefs and modes of worship, to the view of the most numerous sect. The attempt in that way to control the mental operations of persons, and to enforce an outward conformity to a prescribed standard, led to the adoption of this amendment." *Davis v. Beason*, 133 U. S. 333, 342.

With wisdom the Founding Fathers devoted a part of the Bill of Rights to "religion." All the First Amendment rights—speech, religion, press and assembly—are equal, except that religion is more equal than the others. This is so because under our tradition of church and state, we have given religion an esteem and a status and a reverence and a protection that we have not given any of the other guaranteed rights.

> "But there is before us the right of freedom to believe, freedom to worship one's maker according to the dictates of one's conscience, a right which the constitution specifically shelters. Reflection has convinced me that as a Judge I have no loftier duty

or responsibility than to uphold that spiritual freedom to its farthest reaches." *West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1942).

"We are a religious people whose institutions presuppose a Supreme Being." Justice Douglas in *Zorach v. Clauson*, 343 U. S. 306 (1952).

"The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind." Justice Black in *Engel v. Vitale*, 370 U. S. 421.

"Freedom of thought, which includes freedom of religious belief, is basic in a society of free men." Justice Douglas in *U. S. v. Ballard*, 322 U. S. 78.

"Government must inevitably take cognizance of the existence of religion." Justice Goldberg in *Abington School District v. Schempp*, 83 S. C. T. 1560 at 1615.

It is a legal right and not a privilege that every citizen has to freedom of worship.

"Freedom of worship," "freedom of speech," "freedom of the press" and "freedom of assembly" are "rights" secured by the First Amendment within meaning of Civil Rights Act 42 U. S. C. A. Section 1981.

The order of affirmance in the case at bar is in irreconcilable conflict with the law laid down by the same Courts in the cases below by the Constitution and by the statutes, which clearly proclaim that the religion of any child, which includes a Jewish child, must be safeguarded.

In re Santos, 278 App. Div. 373, 304 N. Y. 483.

The order of affirmance in the case at bar is in irreconcilable conflict with the law laid down by the Court of Appeals of other states which claim the religion of the child must be safeguarded.

Petition of Goldman, 331 Mass. 647, 121 N. E. 2d 843 (1954);
Matter of Hale, 207 Misc. 240, 137 N. Y. S. 2d 720;
Ellis v. McCoy, 332 Mass. 254, 124 N. E. 2d 266.

The order of affirmance in the case at bar is in irreconcilable conflict with the law laid down by the same Courts in the cases below by the statutes which clearly state that a guardian ad litem should be appointed to protect interest of child.

Frost v. Frost, 15 Misc. 167, 37 N. Y. S. 18, modified 16 Misc. 430, 39 N. Y. S. 856.

The child is the most important party in these proceedings which determine with whom she shall live, who shall have custody and control over her, and what religious upbringing she shall be subject to. The law recognizes that the infant is the person most interested and affected by any determination as to her custody and that her rights to her own welfare and liberty are paramount to any of the rights of the other parties. It cannot be successfully argued that it would serve a child's best interest to be raised outside the religion of both her parents, to be shut permanently from the sight and hearing of her blood family, and be given to strangers who can abrogate the adoption due to the misbehavior of the child (New York Domestic Relations Law, Section 118). This does not "promote the temporal and moral welfare of child" as stated in Section 114 of N. Y. Domestic Relations Law from which Surrogate Court derived its authority to legalize the adoption whose validity the appellant challenges.

"A habeas corpus proceeding involving the custody of a child is decided upon the Court's view of the best interest and welfare of the child." *N. Y. Foundling Hospital v. Gatti*, 203 U. S. 429, 27 S. Ct. 53, 51 L. Ed. 254.

Children are entitled under the Fourteenth Amendment to the equal protection of the law, otherwise the law would be discriminatory and incur the condemnation of the Fifth

Amendment which proclaims that "no person shall be deprived of life, liberty or property without due process of law. The child's "liberty" was violated by not being allowed to stay with her blood relatives where she was loved and wanted and living happily. Children have the same constitutional rights as adults to the pursuit of life, liberty and the pursuit of happiness. Surely no child who is living happily with a grandparent wants to be taken away and given to utter strangers never to know or ever see her blood family again. Just as a parent has a "natural" right to their child, so a child has the natural right to their parents or blood relations. The grandmother is not seeking to deprive the mother of her child. On the contrary, she is motivated by wanting to protect the mother's natural right to her child and the child's right to her.

The Fifth Amendment of the United States Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law, and includes such protection to minors as well as adults, is the greatest protection to individual rights ever written. The Constitution is not a hollow mockery. The freedom of the individual as we have known it since the birth of this nation will be at an end if the time ever comes when Courts shall hesitate to enforce the guarantees ordained by the Constitution. Any government which sanctions violation of law invites every man to become a law unto himself and fosters anarchy. Against such pernicious doctrine this Court must resolutely set its face. The Constitution would be a delusion and a snare if the Courts didn't protect a weak, helpless child with the same guaranteed fundamental rights to personal liberty which are vouchsafed to the greatest, strongest and richest man in the land.

Our adoption laws, which allow young immature parents at times of stress to give away their children with their signatures, with no notification given to the blood

relatives of the child and with no hearing held (and sometimes as in the case at bar no investigation made into the background of the natural parents and child) to foster parents who can abrogate the adoption due to the misbehaviour of the child (New York Domestic Relations Law, Section 118) does not protect the interest and welfare of a child or the institution of the family which is basic to our culture. The dreadful predicament the world is in today is not due to economic conflicts but to a spiritual and moral paralysis. Have our standards shifted so much that the American people will allow cruel and traumatic acts to happen to our children and allow our adoption laws to remain *status quo?*

The taking of a child by a father who had abandoned it and by a mother at a time when she is distraught and doesn't understand the nature, meaning and consequences of her apparent consent and the transferring of the custody of the child to identified and undiscoverable persons because of the adoptive parents' desire for a child, without the adoption agency consulting the grandmother who is rearing the child and without investigating the mother to see if she understood her terrible act, should be characterized as being against public policy and prohibited by law. Our society boasts of its high order of civilization. We insist that families which live together and pray together are the foundation of a decent community. We deplore the barbarism of uncivilized ancients and the Nazis who snatched children from their families to be raised by the state. Do we practice what we so loudly proclaim, teach and preach? Or does modern civilized law wink at such barbaric practices today? Any law that would permit the forcible taking of a child who is being well cared for by its grandmother for delivery to strangers of a different religion to be snuffed permanently out of the sight and hearing of all of its blood relatives, would be barbaric and destructive of families, communities, civ-

ilization, society and its members. Zephaniah Swift in the first American legal treatise of importance wrote:

> "Our common law is derived from two sources, the common law of England and the practice and decisions of our Courts. Courts * * * are not absolutely bound by * * * precedent. If a determination has been founded upon mistaken principles, or the rule adopted by it be inconvenient or repugnant to the general tenor of the law, a subsequent Court assumes the power to vary from it or contradict it. In such cases they do not determine the prior decisions to be bad law; but that they are not law. This is in the very nature of the institution, is a principle established which corrects all errors and rectifies all mistakes."

Our Courts are not infallible and some of its decisions (although they upheld the law of the land) have engendered bitter criticism and controversy. However, besides judicial law, there is a moral law and surely no law has as its intent the destruction of the family. No man, woman or child across the breadth of this great nation would not find abhorrent what has been done to this child and sanction its return. The Supreme Court would not have to fear public censure for taking a child from strangers of a different religion who have the power to abrogate the adoption and return to her blood family where the relationship is a permanent one.

In the preamble to the Constitution of the United States it states: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." It is notable that this document does not say "We, the states" or "We, the experts" or "We" anybody else but the people. The people of the United States would unanimously approve of children being protected

from cruel and traumatic acts and the protection of the family unit. In 1962 Justice Frankfurter said:

> "The Court's authority * * * possessed neither of the purse nor the sword * * * ultimately rests on sustained public confidence in its moral sanction." *Baker v. Carr*, 369 U. S. 186, 266.

We are a nation horrified by Nazi bestiality towards the Jew and the religious persecution of the Jew by the Russians. But what kind of an "image" can we hope to project to the world that looks hungrily to the United States for material, moral and spiritual help if we, like the Nazis who snatched children from their parents refusing, like the adoption agency, to expose the facts, the destiny and fate of children—never to be seen or heard from again—will allow this Jewish child (who was neither an infant or illegitimate) to be subjected to the cruel and traumatic experience of being snatched from the home of its loving grandmother, where the child was living happily and securely, to be turned over to utter strangers who can abrogate the adoption, to be raised in a different religion and who will never see her blood family again as long as she lives. And what kind of impression can we hope to make on the world in respect to our professions of justice and freedom if we will not give children the same right to life, liberty and happiness that is given adults, and if we do not accord our children the same rights to due process and a full and fair hearing in litigation involving their life and welfare. We hurt ourselves and dim the hopes of the whole world if we will not protect our helpless children.

CONCLUSION.

The New York Statutes as here applied, and the decision of the State Court, are unconstitutional.

The questions involved in this case are substantial and important. Fundamentally the issues are whether justice, religious liberty and personal liberty will remain a living reality.

The orders appealed from set a serious precedent, endanger the public welfare, are contrary to the express provisions of the Constitutions of the United States and of the State of New York, are contrary to the express provisions of the numerous pertinent statutes of the State of New York and contrary to the large number of decisions of the Courts in like cases.

Your Honors, you are being entrusted with a grave responsibility. Your decision will let parents know whether they are free to subject their children to cruel and traumatic acts, the authorized adoption agencies will know whether they are indeed sancrosanct and the Judges will know whether they can arbitrarily ignore every basic and time-honored tenet of American justice.

The Supreme Court can be proud of its record in upholding civil rights for the Negro and religious liberty for minority groups of children. Do not individual children who are helpless to protect their own rights have the same right to the Court's protection? Yet, the decision appealed from deprived an unprotected infant from its rights to liberty, due process and religious freedom which is the birth-right of adults. Upon the record, only the U. S. Supreme Court is empowered to correct the action of the N. Y. court which violated this child's indisputable and basic constitutional rights.

The Court should take this opportunity to reaffirm and implement the words spoken in its name by Justice Bradley in *Slaughter-House Cases*, 16 Wall. 36, 116, 122:

> "Children, included in the term 'all mankind,' may not be deprived of these rights granted to adults simply because they are too young and helpless to invoke these constitutionally guaranteed rights. They are entitled, under the Fourteenth Amendment, to the equal protection of the law; otherwise such law would be arbitrarily and unreasonably discriminatory and incur the condemnation of Amendment 5 which ordains that 'no person shall be deprived of life, liberty or property without due process of law' • • •."

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 478

BESS KAYE,

Appellant,

v.

SPENCE-CHAPIN ADOPTION SERVICE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF APPELLEE TO DISMISS APPEAL

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MOTION OF APPELLEE TO DISMISS APPEAL

Motion to Dismiss

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that appellant's appeal from the order of the Court of Appeals of the State of New York be dismissed on the ground that it does not present a substantial federal question for review within the jurisdiction of this Court.

Jurisdiction

Appellant claims that jurisdiction of this appeal rests on 28 U.S.C. §1257(2) and (3). Appellee will show that the requirements of 28 U.S.C. §1257(2) have not been complied with. 28 U.S.C. §1257(3) is not here relevant as it relates solely to review by writ of certiorari.

Questions Presented

It is respectfully submitted that there is no substantial question presented for review by the Court in this case.

Statement of the Case

Reduced to its simplest terms, this case involves the placement of a child with a private, non-sectarian adoption agency by both of the natural parents over the objections of appellant, the child's maternal grandmother. The litigation has consisted of attempts by the grandmother to have the natural parents' wishes thwarted and to have the child placed with her.

Appellant's daughter, one Karen Kaye, married one Neil Mulhall. A daughter, Heather Mulhall, was born of the marriage on January 24, 1958 (fols. 22-23). After certain marital difficulties, the parents separated. For a short period while the mother was working in New York City, the child was left with her maternal grandmother, the appellant in this case. Thereafter, husband and wife decided that the best interests of the child lay in having her adopted into a good home where she could grow up in a normal family environment. They therefore took the child from appellant's home and brought her to the Spence-Chapin Adoption Service on October 7, 1959. Shortly

thereafter, on November 9, 1959, they executed a release and surrender in order that the agency might place the child for adoption (fols. 35-38).

On November 28, 1960 a writ of habeas corpus was issued to Spence-Chapin Adoption Service (hereinafter "Spence-Chapin") commanding it to produce the infant Heather Mulhall at the Supreme Court, New York County, Special Term, Part XII thereof, on December 7, 1960 at 10:00 a.m. (fols. 28-32). The writ of habeas corpus was allowed upon the petition of the appellant, which recited in substance that she was the maternal grandmother of the infant Heather Mulhall, which infant had been placed for adoption with Spence-Chapin in October, 1959; that on or about October 15, 1959 the natural mother took the child from appellant's home and since that time had prevented appellant from caring for or seeing the infant; that appellant did not desire to see the child adopted since she was willing, able and responsible and had sufficient means to provide a home for the infant (fols. 22-26).

On December 7, 1960 appellee filed its return to the writ stating as follows: Spence-Chapin is a charitable corporation existing under the laws of New York and has qualified as an authorized adoption agency in accordance with the laws of New York State; the infant Heather Mulhall was placed in the custody of appellee for foster care on October 7, 1959 by Neil Mulhall and his wife Karen Kaye Mulhall, the natural parents of the infant; thereafter, on November 9, 1959,* the natural parents executed and delivered to respondent a Declaration and Surrender in accordance with Section 384 of the Social Welfare Law of the State of New York wherein they

* Contrary to appellant's claim (Jurisdictional Statement, p. 5) the parents did not actually execute the surrender to Spence-Chapin until more than a month after the child had been placed in its custody.

"voluntarily, unconditionally and absolutely" (fol. 44) transferred and committed the infant to the custody, control, care and management of appellee and authorized Spence-Chapin, in its discretion, to consent to the adoption of the infant without notice to them; the aforesaid Declaration and Surrender was duly recorded in the New York County Clerk's Office on December 14, 1959; no attempt has been made by the natural parents to disavow the Declaration and Surrender since its execution on November 9, 1959; on or about March 15, 1960, after approximately twenty-two weeks of foster care arranged by appellee, the infant was placed for adoption with adoptive parents where said infant resided at the time of the filing of the return;* the infant, being three years of age, was not produced in person as commanded in the writ since such production would have endangered her physical and mental health (fols. 34-47).

It should be noted by the Court that appellant's petition for the writ of habeas corpus was made more than one year after the infant had been placed with Spence-Chapin.

On December 7, 1960 the first hearing on the writ was held before Hon. Louis J. Capozzoli in Special Term, Part XII, of the Supreme Court, New York County, at which time appellee filed its return.

After a general discussion of the factual issues with the parties, the Court, with the acquiescence and consent of appellant (fol. 70), directed the Family Counselling Unit of the Supreme Court to undertake an investigation with respect to the circumstances surrounding the execution of the Declaration and Surrender by the natural

* For the information of the Court, a final order of adoption in accordance with the laws of the State of New York was entered with respect to the child Heather Mulhall in February, 1961, subsequent to the entry of Justice Gold's order dismissing the writ herein.

parents (fols. 55, 71-2). Accordingly, the Court adjourned the hearing *sine die* to await the completion of the investigation (fol. 81). At the same time the Court strenuously recommended to appellant that she retain counsel to represent her in the proceeding (fols. 51-2, 75).

The matter thereafter appeared on the calendar in Special Term, Part XII, for January 18, 1961, Justice Samuel Gold presiding. At that time appellant requested a further extension of time and the hearing was then set down for January 24, 1961. On the latter date, the proceeding was once again adjourned on the basis of a representation by counsel appearing for appellant that he had been retained only the day before (fols. 91-2, 104) and required time to become acquainted with the facts and to adequately represent appellant (fol. 95). At that time appellant's counsel filed a notice of appearance on her behalf (fol. 108). On February 2, 1961 appellant again appeared before the Court with her attorney and petitioned the Court through other counsel for still another adjournment so that such other counsel, who had been consulted by appellant by telephone on the previous evening, could return from vacation and review the case to determine whether to undertake appellant's cause (fols. 84-5, 89). Justifiably impatient with this continuing pattern of delay, the Court, on February 2, 1961, denied the application for a further adjournment and directed appellant to proceed with her evidence (fol. 86, 98).

After a hearing in which appellant's testimony was offered in support of her petition (fols. 110-147), the Court found against appellant, dismissed the petition, and an order to this effect was entered in the New York County Clerk's Office on the same day (fols. 16-18). On

March 1, 1961 appellant in her own name served a Notice of Appeal from this order (fols. 4-8).*

Thereafter, by order to show cause, appellant moved for a rehearing of the proceeding and for other relief through an attorney, annexing affidavits setting forth many new and additional facts. This motion was denied on April 19, 1961 (fol. 21). On April 24, 1961 appellant served a Notice of Appeal from the order denying her motion for a rehearing and other relief (fols. 10-14).

On December 15, 1961 the Appellate Division, First Department, unanimously affirmed both orders of the lower court without opinion (fols. 316-321).

Thereafter, on February 21, 1963 the Court of Appeals of the State of New York affirmed the orders below, once again unanimously and without opinion.

All of the proceedings in the appellate courts, except for the present appeal, were conducted by legal counsel representing appellant.

After appellant had filed her Notice of Appeal to this Court, she moved in the New York Court of Appeals to amend the remittitur "to show that a question under the Federal Constitution of the United States was presented and necessarily passed on." On July 12, 1963 the Court of Appeals denied this motion.

---

* Appellant complains on p. 13 of her Jurisdictional Statement that the hearing before Justice Gold was a "closed hearing". The truth of the matter is that the court merely acceded to appellee's request that the press be barred inasmuch as there had been some unfortunate publicity after the first hearing on December 7, 1960 which appellee did not believe was in the child's best interests (fols. 98-9).

ARGUMENT

POINT I

There is no substantial question presented for review in this case.

The relief appellant is seeking in this Court appears to be as follows: to upset the order of adoption now almost three years old; to vacate the surrender and release by the natural parents to respondent which was duly executed in accordance with the laws of the State of New York; and to have the child uprooted from her home with her adoptive parents with whom she has resided for close to four years.

Appellee's position that there is no substantial question in this case rests in part upon the following undisputed facts:

> (1) Since its execution in November, 1959 neither of the natural parents has ever questioned the validity of the surrender and release nor expressed any desire to change the status quo.
>
> (2) The courts below, after full judicial review, unanimously found no merit in appellant's position.
>
> (3) Appellant's motion in the New York Court of Appeals to amend the remittitur to state that a Federal question was presented and necessarily passed on was denied.

(a) The surrender of the infant to respondent for adoption more than four years ago has never been questioned by either of the natural parents.

In the instant case no challenge has been made by the natural parents of the infant to the validity of the surrender, although the document was executed almost four

years ago (fol. 37) and the infant has been with her adoptive parents since March 15, 1960 (fol. 38). The challenge here is made by the maternal grandmother of the infant who originally in her petition candidly asserted the true factual predicate for commencing this proceeding. She complained merely that the infant had been taken from her by the natural mother and placed with appellee for adoption; that she had been unable to see or communicate with the child; and that she had no desire to see the child adopted and was willing and able to provide the infant with a suitable home (fols. 23-4). The petition contained no allegation of the mother's mental incompetency, abandonment by the natural father or the alleged illegality of appellee's acceptance and placement of the infant for adoption. These arguments were developed later by the appellant as and when it appeared that desperate measures were necessary in order to attempt to overcome the validity and effectiveness of the voluntary surrender of the infant by its natural parents.

To conclude that the mother of the infant was so unsound of mind as to be incapable of understanding the nature of the surrender of her child and that the experienced staff of Spence-Chapin, who dealt intimately on several occasions with the child's mother, had no inkling of the mother's insanity when they accepted the surrender, is wholly unrealistic.

The claim that the child's father had abandoned her is entirely negated by the uncontradicted evidence in the record that the father asserted the right to his child as against the appellant in October 1959 (fol. 132) and thereafter was a party to the surrender transferring custody of the infant to appellee.

(b) Appellant was given ample opportunity to retain counsel in the lower court.

Appellant's present complaint of lack of counsel, which was urged before both the Appellate Division and the New York Court of Appeals, is easily refuted by a factual analysis of the proceeding below.

The writ of habeas corpus was first returnable on December 7, 1960 (fol. 29). At that time the court adjourned the proceeding pending its receipt of a report from its social investigative agency (fol. 81) and strenuously recommended to appellant that she retain counsel (fols. 51-2, 75). On January 18, 1961 the writ was again made returnable, at which time appellant appeared in person and requested a further adjournment in order to permit the issuance and service of subpoenas. The matter was accordingly adjourned to January 24, 1961. On the latter date appellant appeared by counsel, who filed a notice of appearance on her behalf (fol. 108), and upon his representation to the court that he required additional time to prepare for the hearing it was adjourned to February 2, 1961 (fols. 94-5). On February 2, 1961, although counsel who had filed a notice of appearance on her behalf was present (fol. 84), an application was made by other counsel for a further adjournment so that still a third attorney, who had been consulted by appellant on the eve of the hearing (fols. 89, 141), would have the opportunity to return from vacation in Florida to consider whether to undertake appellant's representation (fols. 84-5). Appellant in her own name had issued eight subpoenas for the production of documents returnable at the hearing on February 2, 1961 (fol. 99). Upon these facts, the court properly directed that the parties proceed (fols. 86, 98).

From the record, therefore, it is clear that appellant had from October 7, 1959, the date the child was returned to the custody of her natural parents (fols. 24, 36), or at least from November 28, 1960 (the date of the issuance of the writ of habeas corpus), to obtain counsel to represent her in the proceeding. It is also clear that she was constantly advised by the court in the early stages of the proceeding to retain counsel (fols. 51-2, 75) and that she took no steps to do so until January 23, 1961, the evening before the matter was set for hearing (fols. 90-1). This attorney was subsequently discharged by appellant on February 2, 1961, the day the final hearing was held before Justice Gold. Indeed it does not appear that appellant retained counsel again until after March 1, 1961, at which time she served in her own name a notice of appeal from Justice Gold's order of February 2, 1961 (fols. 7, 288). Obviously the appellant, who chose to commence the proceeding in her own name, had adequate opportunity to obtain counsel of her choice sufficiently in advance of the hearing to insure that she would be properly represented. No valid claim can be made therefore that appellant was denied the right to counsel.

Appellant further complains that she did not receive a fair hearing below because of certain rulings made by the lower court.

Any judgment concerning the validity of appellant's arguments in these respects can only be made upon consideration of (1) the interests the court is required to protect in a custody proceeding, and (2) all the facts in the record, including the opportunity of the court below to observe the demeanor of appellant through all previous appearances in the matter.

As to the question of the interests to be protected in this proceeding it is clear that, inasmuch as the welfare

of an infant was involved, the sole duty of the court below, as *parens patriae,* was to protect her rights and interests. *New York Foundling Hospital* v. *Gatti,* 203 U. S. 429 (1906); *People ex rel. Riesner* v. *N. Y. Nursery and Child's Hospital,* 230 N. Y. 119 (1920).

As stated by this Court in the *Gatti* case:

> "It was in the exercise of this jurisdiction as *parens patriae* that the present case was heard and determined. It is the settled doctrine that in such cases the court exercises a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements. Such cases are not decided on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in custody of one person or another. • • •" 203 U. S. at 439.

Thus it is clear that appellant, as the petitioner in a custody proceeding, represented no protectible interest and that the sole issues before the court below were (a) whether appellee had a lawful and proper right to the custody of the child, and, if so, (b) whether such custody was consistent with the welfare of the child.

Appellant, in her role as the petitioner in a custody proceeding, therefore, unlike that of a litigant in a civil case or a defendant in a criminal action serves the sole function of directing the court's attention to facts which might bear adversely upon a child's welfare. Once this privilege has been afforded, however, such an individual is entitled to no more of a hearing than that which the court, in its discretion, deems necessary to protect the child's best interests.

In this respect the record reveals that the court below scrupulously fulfilled its obligation to protect the infant, to the point of invoking its social investigative arm, with appellant's consent, to make an investigation and report on the welfare of the child and the circumstances of her surrender by her parents. This, although the child had been surrendered to an authorized agency by a duly executed surrender. After completing this investigation, the court went still further in its effort to explore all facets of this writ and permitted appellant the opportunity to present testimony. In the light of the foregoing circumstances no valid claim of unfairness can be made.

Since the prime interest of the court was the welfare of the child and inasmuch as the evidence established a proper basis for the child's custody being reposed in appellee and a total lack of merit in appellant's position, the court below, in the sound exercise of its discretion, "after hearing and seeing the [appellant]" determined that the petition should be dismissed on the grounds that "there is no basis for this petition * * *" (fol. 143). The exercise of that discretion should not be disturbed.

(c) The failure of the New York Court of Appeals to amend the remittitur weighs heavily against appellant.

It is the traditional practice of the New York Court of Appeals, when there is any doubt whether it necessarily passed on a federal question, to amend its remittitur to so state. Its procedure in this respect has often been recognized by this Court. *Lynch* v. *New York*, 293 U. S. 52 (1934).

Appellee respectfully submits that the only fair inference to be drawn from its present failure to so amend the remittitur is that no federal question was presented

and passed upon and that there were adequate state grounds for affirmance.

Rule 15(1)(d) of this Court places the burden upon appellant to show the manner in which the federal questions presented "* * * were passed upon by the [state] court; * * *" The jurisdictional statement presented to this Court completely fails to carry this burden.

POINT II

The present appeal does not satisfy the requirements of 28 U.S.C. §1257(2).

Appellant claims that the jurisdiction of this Court rests on 28 U.S.C. §1257(2). That section provides as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The gist of appellant's complaint, however, has never been that the relevant provisions of the New York statutes are invalid, but simply that they were improperly applied in this case. The New York statutory provisions require "when practicable" that a child be placed with adoptive parents of his or her religion. Appellant's claim is that the child, having been born of a mother who herself was born into a Jewish family, is of the Jewish

religion. This claim is made entirely without any knowledge of what the actual religion of the parents was, if indeed they espoused any religion, at the time they surrendered the infant to appellee. In this case, it has been stated that the mother was a nonpracticing Jew, the father a nonpracticing Roman Catholic and that their marriage was solemnized in a Unitarian church. Under such circumstances, the child's religion was not clearly determinable without resort to conflicting bodies of ecclesiastical law. Accordingly, it may be assumed that the court whose duty it was to pass upon the question of whether the moral and spiritual welfare of the child would be promoted by granting the final order of adoption exercised the discretion conferred upon it by the New York statutes. It is the exercise of this discretion which appellant challenges, rather than the constitutionality of the statute which authorized the exercise of that discretion.

It cannot be too strongly emphasized that appellant's position has always been in favor of the validity of the religious provisions in these statutes.

It has only been in this Court that she has attempted to frame her questions in accord with what she considers the proper jurisdictional formula, and even now she argues that the New York statutes have been violated rather than that they are unconstitutional, since she expressly claims that

> "The orders appealed from * * * are contrary to the express provisions of the numerous pertinent statutes of the State of New York * * *." (Jurisdictional Statement, p. 5)

The entire Jurisdictional Statement is really a claim of denial of individual due process rights. In response to this argument, it is appellee's contention that no substantial question is presented for review by this Court. (See Point I, *supra.*)

Conclusion

It is submitted that the welfare of the child, now almost six years of age, surrendered to appellee more than four years ago by both her natural parents, neither of whom have since attacked the surrender, would be seriously affected if appellant is permitted to prolong this fruitless litigation. Appellee respectfully requests that the within appeal be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 478

BESS KAYE,

Appellant, Pro Se,

—v.—

SPENCE CHAPIN ADOPTION SERVICE,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

BESS KAYE
160 Weyman Ave.
New Rochelle, N. Y.
Appellant, Pro Se

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May It Please the Court:

Appellee has filed a motion to dismiss and I the appellant submit this brief in response to the motion.

In appellee's Statement of the Case and under "a" in Point 1, the appellee claims that "the husband and wife decided that the best interest of child lay in having her adopted into a good home" and that the parents have not attacked the surrender. Should two irresponsible young separated parents—the mother emotionally disturbed (pp. 70, 71, 72R, Exhibits C, D, E) and the father having completely abandoned the child be allowed to make a decision about the life and welfare of the child? In the record (144R) the grandmother claims abandonment by father. She subpoenaed the records of the Domestic Relations Court to prove her claim, and this record was among the papers that Judge Gold refused to let her see and that Judge Gold admitted having before him (131R).

It would be indeed surprising if the natural parents described above would have attacked the surrender. The father having completely abandoned the child and the mother being emotionally disturbed and their *having never at any time attended any proceeding or hearing involving the child's fate* shows that having got rid of the child they do not want any further responsibility concerning the child.

In the Declaration and Surrender (14-15R) it states "that said child may be adopted by such person or persons in its discretion it may select or that the child may be placed by said agency in its discretion in foster care." It is inconceivable that even irresponsible and immature young people could take a child, who is old enough to tell its grandmother that she loves her and who was living happily and securely with her grandmother, and turn her over to an adoption agency and sign a paper that states that the adoption home can in its discretion keep the child in a foster home, subsequently to be shifted from one foster home to another.

Also, in the Statement of the Case, the appellee, in answer to appellant's (the grandmother) charge that the hearing was secret, claims that the adoption home's former attorney asked Judge Gold to bar the press to protect the child from possible further publicity. The following substantiates that it is not the welfare of the child that the Spence Chapin Adoption Service was concerned with, but rather the adverse publicity they received. After appearance before Judge Capozzoli, almost all the New York papers carried the story and "The News" headed their write-up "Court Orders Probe of Peculiar Adoption."

Quoted in part is the following from "The News" on December 7th:

> "Capozzoli asked: Is the Spence Chapin Service so sacrosanct that it cannot be questioned in this manner? I don't think a child should be put up for sale to the highest bidder."

From "The Mirror" December 7th, Judge Capozzoli said:

> "I don't think a child should be put up for sale. The whole matter smells to me. I say it is suspicious."

In Appellant's Jurisdictional Statement (p. 13) she quotes from the American Law Reports Annotated which states the "the decree awarding custody of a minor child must be based on evidence heard in open court in observation of due process".

In "b" under Point 1, the appellee claims that the appellant (the grandmother) was given ample time to obtain counsel. The appellee has misled the court on certain facts. In answer to appellee's charge that grandmother waited a year to take action, the appellant would like to inform Court that the day after the child was taken she went to a lawyer, a Mr. Louis Zasloff. Mr. Zasloff claimed he could not locate the whereabouts of the child and it wasn't until the grandmother was successful at obtaining this information that she could start action. When appellant appeared before Judge Capozzoli,[1] the appellee maintained that the grandmother had no standing. The grandmother not knowing then how to combat this argument,[2] the only way Judge Capozzoli (who was sympathetic to the grandmother's cause, 54R) could refrain from dismissing her writ was to

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1 A lawyer that appellant knew told her that the hearing would be informal and that she could handle it.

2 The appellant has had time since then to learn something about the legal aspects of her case.

order an investigation to see if the grandmother had grounds and a right to a hearing.[3]

> "Judge Capozzoli: Now, if after such an investigation comes in I find that it is useless procedure to give her a hearing on this writ, that is the end of it. If, on the other hand, I think there should be an open hearing, an airing of this business, I shall order a hearing" (57-59R).

Therefore, the appellant did not know if she would receive a hearing until the completion of the investigation. On January 13, the appellant was informed that she was granted a hearing to be held on January 18th.[4] Between these few days the week-end intervened, so the appellant received her first adjournment of six days to the 24th of January. Almost immediately afterwards, the appellant became ill and a Doctor Elkind of New Rochelle came to her home. At her request he sent Judge Gold a letter stating that the appellant could not leave her home for ten days. Appellant refers to this twice in the record (87R, 97R).

To further insure her writ not being dismissed, appellant requested an attorney she knew, Joseph Glass, whose office is near the Supreme Court Building, to appear and ask for a 10 day adjournment due to her illness. Unknown to appellant, Joseph Glass sent his son William to appear and William Glass asked for an adjournment to prepare for the case. The following substantiates the appellant's statements. After the request for adjournment, the appellant called Joseph Glass to retain him. He was busy and had his

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3 The appellee and appellant have both failed to inform the Court that no stipulation was entered into between the two parties.

4 There was not enough time to obtain competent legal representation for a case such as this.

son William speak for him. The appellant impressed upon the son that it was his father Joseph Glass, a man experienced in adoption work, that she wished to retain. This was the first time in her life that appellant spoke to William Glass, the son of Joseph Glass. The following, in his own words, is what the son William claimed at the hearing that he said to appellant after the request for adjournment:

> "I told Mrs. Kaye to come down and give me the facts and I would examine them and tell her at that point whether or not I would take her money" (94R).

The following, in Mr. Glass's words, is his admission at time of hearing that he had never obtained the facts:

> "Mrs. Kaye has not seen me to date. She was sick, could not come down. I could not go up to New Rochelle and get the facts and I would not take the facts over the phone" (96R).

Mr. William Glass's words in the record speaks for itself. Although the appellant did not even know of the existence of William Glass at the time she requested his father to obtain a 10 day adjournment due to her illness, although she spoke to said William Glass for the first time in her life after the request for adjournment, although she claimed at her hearing that the first time she had ever seen William Glass was at her hearing (90R) and although she insisted at five different times at her hearing that she had not retained William Glass (87, 88, 89, 107R), still for argument's sake, assuming *arguendo* that Joseph Glass had misunderstood the appellant's request, the fact remains that a *litigant has the right to assume that an attorney has not been retained if he tells her that he will not take her money until he hears the facts and admits that he never got the facts.* In the face of the fact that appellant maintained

five times at her hearing that she had not retained William Glass and in light of William Glass's own statements, it is illogical, unrealistic and untrue for appellee to make the assertion that appellant discharged William Glass at time of hearing and appellee cannot and does not point to anywhere in the record that this is so. This mix-up only becomes believable in the light of the subsequent unbelievable injustices that appellant received from Judge Gold, the Trial Court Judge, the Appellate Division, the Court of Appeals and the State Reporter.[5] Also untrue is the appellee's claim of appellant having three attorneys. The record substantiates that it was the associate of Mrs. Shientag, *the first attorney appellant retained* that requested the adjournment at hearing (86R).

Since the sum total time of the two adjournments granted appellant prior to the actual hearing was only 17 days and were for valid reasons, the appellant expected (and was so assured by Mrs. Shientag) that the ten day adjournment requested for her return would be granted, appellant made no preparations for her case (other than serving the subpoenas) and informed her witnesses not to appear.[6] With no witnesses, with not being able to see her subpoenaed documents to prove her claims, with Judge Gold allowing the director of the Spence Adoption Service to ignore her subpoena and to ignore the subpoena to produce their records, with Judge Gold failing to cause any exploration of the vital objective factors to be made particularly concerning the child's whereabouts and surroundings and any facts about the adoptive parents including religion of adoptive parents, with Judge Gold failing to keep promise to appel-

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5 Appellant refers to this later in brief.

6 Appellant inadvertently failed to notify a Mrs. Landau not to appear at her hearing. She was to testify to father's abandonment, but appellant was not given opportunity to question her. (144R)

lant and Court to have her papers made part of the record in support of her petition, with Judge Gold making his decision based on secret evidence (all underied by appellee) made it impossible for appellant and child to receive a full and fair hearing in accordance with due process and receive "full judicial review" as claimed by appellee in Point 1 on page 7.

I tried to limit the Jurisdictional Statement to merits of the case, but since the appellee dwells on my obtaining legal representation, I feel it is necessary to correct the erroneous impression created by appellee's brief. Appellant would also like to correct the erroneous impression made by Judge Gold's "after seeing and hearing the witness" that the appellee refers to The Jewish Reform Temples who demand that their Sunday School teachers be secular teachers of high moral character, possess certification and Sunday School teaching experience, felt inclined (although appellant is no secular teacher and has not completed her certification) "after seeing and hearing the appellant" to entrust her with the religious and moral training of groups of children up to 60 in number (Exhibit K, p. 87R; Exhibit J, p. 84R). The appellant's attempted aspersions upon the character of the appellant is not substantiated anywhere in or out of the record or in oral argument.[7]

Under (b) of Point 1 the appellee claims that the grandmother represented no protectible interest. New York Domestic Relation Law Section 118-a (new) and Section 117 (old) states that "anyone in behalf of a child can make application for abrogation."

The following United States Supreme Court cases also uphold the grandmother's right to fight for her grandchild:

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7 Appellant is now acting as her own attorney as the appellee's objection to her using typewritten records necessitated the outlay of considerable sums of money.

"The principle that parties may rely only on constitutional rights which are personal to themselves is not disrespected where constitutional rights of persons who are not immediately before the court." *NAACP ex. rel Patterson,* 357 U. S. 449-78 S. Ct. 1163-2 L. Ed. 2d 1488.

"The 'rule denying standing to raise another's rights . . . is only a rule of practice' and it will not be applied when 'the reasons which underlie our rule . . . are outweighed by the need to protect . . . fundamental rights which would (otherwise) be denied.' Barrows v. Jackson, 346 U. S. 249, 257.

"The Court has exercised its jurisdiction over cases 'where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative (who was) before the Court.' "

NAACP v. *Alabama,* 357 U. S. 449, 459-460;
Bates v. *Little Rock,* 361 U. S. 516, 523;
Communist Party v. *Subversive Activities Control Board,* 367 U. S. 1, 81;
Cf. McGowan v. *Maryland,* 366 U. S. 420, 429, 430.

Re appellee's claims that "the appellee, unlike the litigant in a civil case or a defendant in a criminal action, serves the sole function of directing the court's attention to facts which might bear adversely upon the child's welfare. Once this privilege has been afforded, however, such an individual is entitled to no more of a hearing than that which the court, in its discretion, deems necessary to protect the child's best interest." In her Jurisdictional Statement the appellant quoted from the "Constitution of the United States of America" (p. 16, J. S.) that holds that a person involved in administrative as well as judicial proceedings is entitled to due process. In *Wunsch* v. *Wunsch,* 248 Wis. 29, 31 the Court held:

> "While the right to the custody of a minor child of tender years is a matter very largely in the discretion of the Trial Court, still a contest as to that matter is a judicial proceeding and the discretion must be exercised on legal grounds and the determination of the court subject to review as in other cases."

In *Voss* v. *Voss*, 157 Wis. 430, the Court held:

> "The Court maintains that a contest between parents as to custody of child is clearly a judicial and not an administrative matter and the procedure governing judicial proceedings should govern."

Under "c" in Point 1, the appellee argues that the failure of the Court of Appeals to amend the remittitur bears heavily on the appellant, but *appellee commendably does not deny that constitutional questions were timely raised.* Appellant's statement about the raising of the constitutional question needs clarifying. The question of due process could not be raised in the Trial Court as appellant did not know she and child would be deprived of due process. *The question of due process was first raised on appeal to the Appellate Division.* Since it was only on oral argument that the appellant had a solid basis of fact to know that child had been put in wrong religion, it was in her Motion for Reargument to the Appellate Division that the religious issue was first raised as a constitutional question. Due to her lack of legal training, appellant did not notice that the Motion for Reargument made to the Appellate Division was not made part of the record. However, since the appellee does not deny the appellant's statement in her Jurisdictional Statement about the Motion for Reargument and appellant quotes the exact place the questions were raised, the appellant prays that the Court will not penalize her for

her attorney's inadvertence in failing to make the motion part of the record.[8]

> "The Court itself has the power to examine into the raising of the federal question and if it is convinced that the highest state court's refusal to deal with that question is a mere evasion, the court's jurisdiction can be asserted." *Rogers* v. *Alabama*, 192 U. S. 226, 230-1.

The "Court must determine for itself" whether "a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States" and "is not concluded by the view taken . . . by the state court."

> *1st Nat'l Bank* v. *Anderson*, 269 U. S. 341, 346; *Staub* v. *Baxley*, 355 U. S. 313, 318.

In framing the federal question for presentation to the State Court, the litigant is not bound to follow any particular form of words or phrases. It is essential only that he bring the federal claim and the grounds therefor to the state court's attention with fair precision. And "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

> *N. Y. ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67.

Re the appellant's claim that the natural mother is a non-practicing Jew. The unbelievable injustices suffered by appellant did not stop after the rendition of judgment by the Court of Appeals. The State Reporter, or whoever is responsible for the citation of cases in the law books, chose

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8 If the Court feels it necessary to have a certified copy of Motion for Reargument to Appellate Division the grandmother is hopeful that the Court will give her an opportunity to obtain same.

to ignore the question of religion in citing this case although the religious question, outside of the due process, is the main issue of the case at bar *Kaye* v. *Spence Chapin Adoption Service*, 12 N. Y. 2d, page 951. Likewise, now, the appellee claims that "the entire jurisdictional statement is really a claim of individual due process rights." By now, the appellant should know that "wishing does not make it so." If the adoption service had investigated the natural parents and child and if they had not ignored the grandmother's and the Rabbis when they contacted them, before child was placed with adoptive parents, they would not now be accused of aiding and abetting an emotionally disturbed mother and an irresponsible father (who abandoned the child) to violently seize the child to give up for adoption. They also would not now be accused of putting child in wrong religion. Although the appellee does not deny that the religious question was raised in lower courts and the religious question was in Notice of Appeal to the Supreme Court and although at least five pages are devoted to the religious question in appellant's Jurisdictional Statement, he so strongly wishes that the adoption agency was not accused of putting the child in the wrong religion (which is a reflection on his law firm) that he says "the entire jurisdictional statement is really a claim of individual due process rights."

Although the appellee made the above statement in an effort to clear the adoption home and his law firm of any guilt, it is not that simple. He argues the point by saying "it has been stated that the mother is a non-practicing Jew." This has only been stated by the *appellee and it wasn't until oral argument in Court of Appeals upon direct questioning from the Judges that it was stated.* The appellee commendably does not deny that the former attorney for the Spence Chapin Adoption Service argued in the

Appellate Division that natural mother is a Protestant and in Court of Appeals that she is a non-practicing Jew. The only substantiating evidence in or out of the record or in oral argument that natural mother is a non-practicing Jew is that she was married by a Unitarian minister (appellee does not claim that she belongs to a Unitarian Church). Attached to the Motion for Reargument is a letter from Dr. Harrington, the minister who married the natural mother in which he says that "a Jew joining a Unitarian Church remains a Jew and a member of their own synagogue." This point was subsequently argued in the Leave for Appeal and brief to Court of Appeals which was never denied by appellee. Therefore, a Jew getting married by a Unitarian Minister in no way precludes him from remaining a Jew in good standing.

Just as the appellant admittedly vacillated about the mother's religion in the lower courts, so now there is vacillating about the father's religion. In the lower courts, the former attorney for the adoption home claimed the father was a non-believer. Now, the present attorney for the adoption home chooses to make the father a non-practicing Catholic. It is plain to see that the Spence Chapin Adoption Service never knew exactly the religion of either parent.

The facts are that the mother attended a synagogue for many years and was confirmed from Sunday School (Exhibit J, p. 84R). She has always had and still has a deep feeling for her religious heritage and has never renounced being a Jew. In the eyes of God, the mother (born of Jewish parents, who were born of Jewish parents), in the eyes of the Rabbis, in the eyes of her parents and family, and in the eyes of herself she is considered a Jew.

The father may or may not have been born of Catholic parents.[9] What is known is that he left home at an early age and never believed, or embraced or practiced or attended any kind of a house of worship. The appellee's claim in the lower courts that the father is a non-believer is a more accurate appraisal of the father's religion.

Besides the fact that in the Jewish religion the child takes the faith of the mother based on certainty of parentage (Exhibits I and O on pp. 84-90R) (the Jews are a race and a culture, besides a religion), New York decedent law does not allow an illegitimate child to inherit from the father even where the father is known (Section 83 Decedent Estate Law). The statutes of Massachusetts hold:

> "In making orders for adoption, the Judge when practicable must give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of the mother." General Laws (Ter. Ed.) c. 210, Section 210 5B inserted by St. 1950, c. 737, Section 3.

In the closest case appellant has found to approximate her case, the *Glovis* v. *Glovis case*, 121 N. Y. sub. 2nd, page 12, the mother is Jewish and the father, unlike the non-believing father in the case at bar, is a Catholic in good standing. Yet, the Court saw fit to award the child to the Jewish paternal grandfather. Judge Panken, the Trial Judge in the *Glovis* case, in his opinion says:

> "I should, however, advise serious thought on the part of both parents as to whether the child should embrace a religion other than the religion of either of the parents. This certainly would harm the child."

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9 Appellant has never met the family of the natural father and does not know where they live or anything about them.

In the case at bar the child has been put in the Protestant religion which does not represent the religion of either of her natural parents. How can it be successfully argued that to put a child *outside the religion of either parent protects the religion of the child?* The child in question having been born of a father who appellee argued in the lower courts is a non-believer and a Jewish mother to be raised in the Protestant religion is a violation of her religious freedom as guaranteed by the free exercise clause of the First Amendment of the U. S. Constitution.

The words "when practicable" shall be interpreted as being without force or effect if there is a proper or suitable person of the same religious faith as that of the child available for appointment as guardian, or to be designated as custodian, or to whom control may be given, or to whom orders of adoption may be granted. Subdivision "e" of Laws of 1962, Chapter 686, effective 9-1-62 of the N. Y. Family Court Act.

In the case at bar, not only was there a suitable person of the same religious faith as that of the child available, it was her own maternal grandmother who was desirous, and even anxious, to continue raising child in the Jewish religion.

The Trial Judge (Judge Gold) allowed the adoption home to ignore the subpoena for their records that would have proved what religion the adoptive parents were and the Appellate Division ruled without knowing the religion of the adoptive parents, as it wasn't until oral argument in Court of Appeals that the appellee disclosed the religion of the adoptive parents. Since the appellee did not disclose the adoptive parents' religion until argument in Court of Appeals and since the appellant's (the grandmother) attorney was not allowed but a few minutes in rebuttal to the appellee's claims, the appellant's attorney

was not given a chance to refute this erroneous statement. The appellant's (the grandmother) attorney wrote the Court a letter after argument, but appellant does not know why, under the circumstances, her attorney did not ask for reargument. Therefore, as to the question of religion, not any of the lower courts actually knew the religion of the natural parents and only the Court of Appeals knew the religion of adoptive parents from oral argument.

The appellant cannot stress too strongly to the Court the vacillation of the appellant about the religion of the natural parents and that nowhere in the lower courts did the appellee put in writing the religion of the natural parents, child or adoptive parents (undenied by appellee). Appellant asks the Court to please notice that the *appellee still refuses to put in writing the religion of the adoptive parents in their brief to the Supreme Court.*

Appellee contends that the present appeal does not satisfy the requirements of 28 U. S. C. Section 1257 (2). In all due respect to the appellee, it is the validity of New York Statute Section 114 of the Domestic Relations Law from which the court derives its authority to grant adoption that is the basis for appellant's right to appeal.

Appellee contends that 28 U. S. C. 1257 (3) is not here relevant as it relates solely to review by writ of certiorari. As the Court knows, sometimes a case falls in both appeal and certiorari. The appellant feeling that her case fell in both categories, took the way of appeal. She listed 28 U. S. C. 1257 (3) in the event that the Court will treat her case as a writ of certiorari. 28 U. S. C. Section 2103 provides that:

> "If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States Court of Appeals, in a case where the proper mode of review is by petition for

certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted upon as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken."

E.g., Anon v. *Baker*, 360 U. S. 287, 290;
Slagle v. *Ohio*, 366 U. S. 259, 264.

Re appellee claims that no substantial questions were raised. Besides, as appellant shows in her Jurisdictional Statement, there being an irreconcilable conflict with the law laid down by the same New York Court of Appeals (p. 15, J. S.) and an irreconcilable conflict with the law laid down by the United States Supreme Court (pp. 10, 11, 12, 14, J. S.) there is also an irreconcilable conflict with the law laid down by the New York Court of Appeals in the case at bar and the law laid down by other state Courts of Appeals. The following three decisions are among the cases that the New York Court of Appeals used in their opinion of the *Kessler* v. *Kessler* case supporting their decision to grant a rehearing:

"The right to confront and cross-examine witnesses lies at the basis of our judicial system. The existence of a back door to the Courtroom and thus, to the Judge's private ear is abhorrent to our ideas of justice." *Rea* v. *Rea*, 195 Ore. 252.

In *Tumbleson* v. *Tumbleson*, 117 Ind. App. 455 the Court held in granting a rehearing:

"Where a claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all evidence received by the Court and be given an opportunity to test, explain or rebut it."

CONCLUSION

Appellee emphasizes the fact that the adoption has already been legalized in an apparent effort to convey the impression that the child is in a secure environment. What appellee overlooks is that New York law denies to an adopted child the secure status that it has in its own family:

> "A foster parent who in pursuance of this article or of any act appealed hereby shall have adopted a foster child from an authorized agency may apply to a Judge or Surrogate of the court in which the original adoption took place for the abrogation of such adoption because of any misdemeanor or ill behavior of such child." Domestic Relations Law, Section 118 (old), Section 118 b (new).

Besides the substantial and shocking violations of due process, in litigation involving a child, which violates the due process clause of the Fourteenth Amendment of the U. S. Constitution, the violation of the free exercise clause of the First Amendment of the U. S. Constitution and the violation of the Fifth Amendment of the U. S. Constitution by the child being deprived of liberty without due process of law and the attack upon the validity of the New York statute, for an irreconcilable conflict to exist between recent decisions of the same Court of Appeals and an irreconcilable conflict to exist between the New York Court of Appeals and other states and an irreconcilable conflict to exist between the New York Court of Appeals and the United States Supreme Court makes the case at bar of general importance in order to secure uniformity of judgments.

The resolution of this case will have immediate importance far beyond the particular facts and parties involved,

for this case presents principles which affect many people throughout the country, so the appellant respectfully and humbly requests that the appellee's motion to dismiss the appeal be denied.

Respectfully submitted,

BESS KAYE
160 Weyman Ave.
New Rochelle, N. Y.
Appellant, Pro Se

Office-Supreme Court, U.S.
FILED
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No. 478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BESS KAYE,

Appellant,

—v.—

SPENCE CHAPIN ADOPTION SERVICE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

PETITION FOR REHEARING

BESS KAYE
Petitioner, Pro Se
160 Weyman Ave.
New Rochelle, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BESS KAYE,

Appellant,

—v.—

SPENCE CHAPIN ADOPTION SERVICE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of December 9, 1963 dismissing her appeal, treating her Notice of Appeal as a petition for Writ of Certiorari, and denying Certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals of New York in the above-entitled case as prayed for in the Jurisdictional Statement filed September 18, 1963 herein.

Reasons for Granting Rehearing and Issuing the Writ

I. The order dismissing the appeal stated that this action was predicated on for "want of jurisdiction". Appellant, therefore, assumes that the appeal was dismissed because of insufficiently detailed specification of the raising of the Federal question. Appellant had no way of knowing that she would not receive due process in the Trial Court. Since her request for a ten day adjournment for her attorney to return was denied, as a layman she should not be penalized for not knowing how to couch her rights. She

did, however, say to the Trial Judge "Your Honor, I have a right to see the records I have subpoenaed" (R. 142). When her attorney entered the picture in the Appellate Division he promptly claimed that the unfair procedure was a denial of due process. Quoted in part from brief to Appellate Division from page 22, 2nd Paragraph "The violation of due process by not allowing a party to be represented by counsel is not cured by the trial court's suggestion that she may have counsel after the hearing is concluded (146)"; and in the Motion for Reargument in that Court he *specifically relied on the Federal due process clause.* The religious freedom question was likewise raised in brief, but it was only upon argument in Appellate Division did appellant definitely discover that child had been placed in wrong religion and when this information was discovered the Federal claims were made.

The following excerpts are in the affidavit that is part of the certified copy of Motion for Reargument made in Appellate Division and filed herewith Page 3, Points 8 and 9:

> "Was there a violation of *Section 1, Amendment 14 of the United States Constitution,* by the seizure of the child and placing her with strangers of a different religion?
>
> "Was the failure of the court to appoint a special guardian or guardian ad litem to represent the infant on the hearing, and the failure of the Court to protect the child by other means, and the failure and refusal of the court to require respondent to disclose the facts concerning the adoptive parents, a *violation of the same section of the Constitution which accords to the child the right of due process* and the equal protection of the laws of the State of New York?"

Page 8, Point 8 from certified copy of Motion of Reargument in Appellate Division filed herewith:

> "The three year old child here involved has been deprived of her liberty *without due process and has not been accorded the equal protection of the laws in violation of Section 1, Amendment 14, United States Constitution.*"

The Federal claims were preserved in the Court of Appeals (see certified questions in Notice of Appeal to Court of Appeals in Record on Appeal).

The following excerpts are from certified copy of brief to Court of Appeals filed herewith

Bottom page 22 and top page 23:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * Amendment 1, United States Constitution."

The First Amendment is operative against New York and all other States by virtue of the Fourteenth Amendment, Section 1. The State of New York, by Article 1, Section 3, of its constitution, provides that

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind * * *"

Bottom page 24 and top of page 25 of certified brief to Court of Appeals filed herewith

> "The United States Constitution, Amendment XIV, Section 1, almost 100 years old, still guarantees that no state shall deprive any person of life, liberty or property without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws."

Top Page 27 of certified brief to Court of Appeals filed herewith

> "The Fifth Amendment of the U. S. Constitution, which provides that no person shall be deprived of life, liberty, or property, without due process of law, and includes such protection to minors as well as adults, is the greatest protection to individual rights ever written."

II. In the State Appellate Courts appellant asked for a rehearing to afford her and child a full and fair hearing. The controlling issue, therefore, in the state courts was the due process clause and since the due process clause was raised as a federal violation of due process, the Federal question was necessary to a determination of the case. And since, besides the due process clause the religious freedom and child's liberty were also raised as Federal constitutional questions there was no adequate non-federal ground of decision and the non-federal question was not adequate to support the judgment of the Court of Appeals. Under these circumstances the refusal of the Court of Appeals to pass upon the federal question is just as reviewable as an express decision on the point.

CONCLUSION

Having shown the Court, that the Federal questions were timely raised, as applied to the facts of this case, and subsequently raised in the Court of Appeals and that the non-federal question was not adequate to support the decision of the Court of Appeals your appellant respectfully requests that a petition for rehearing be granted.

Bess Kaye
Petitioner *Pro Se*

Certificate of Petitioner *Pro Se*

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

BESS KAYE
Petitioner *Pro Se*